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**IN THE UNITED STATES DISTRICT COURT**  
**FOR THE DISTRICT OF ARIZONA**

IN RE: Bard IVC Filters Products Liability  
Litigation

No. 2:15-MD-02641-DGC

**DEFENDANTS' RESPONSE IN  
OPPOSITION TO PLAINTIFF'S  
MOTION FOR  
RECONSIDERATION**

(Assigned to the Honorable David G.  
Campbell)

Plaintiff's Motion for Reconsideration (Dkt. No. 10873) is based upon a false premise. While Plaintiff claims there are two reports of "death from filter migration to heart in Eclipse patients," (Pl.'s Mot. at 4 (citing Complaint File Nos. 313635 and 354264)), a close inspection of those two complaints confirms *they are not cephalad migration-related deaths*, nor are they at all similar to the reports of Recovery Filter cephalad migration deaths that Bard received in 2004 and 2005. Indeed, a review of the complaint files confirms that for one of the events cited by Plaintiff (No. 313635), the Eclipse Filter likely saved the patient's life, and only after a competitor filter was subsequently implanted did the patient unfortunately pass away. For the other event cited (No. 354264), the Eclipse Filter migrated only to the "proximity of the right atrium" (i.e., not fully lodged in the patient's heart), the cause of the patient's death was thought to be pulmonary embolism, and the doctor involved in the case did not believe that the patient's death was "related" to the filter.

With Plaintiff's false premise exposed, her Motion for Reconsideration becomes nothing more than a rearguing of the points she made in her prior Response Brief (Dkt. No. 10701) and during the argument concerning this issue on April 13, 2018. For the reasons this Court has already articulated, (*see* Dkt. No. 10819, at 3-6), Plaintiff's arguments concerning the alleged relevancy of Recovery Filter cephalad migration-related deaths should be rejected.<sup>1</sup>

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<sup>1</sup> This Court recently stated that "[a] motion for reconsideration will be denied 'absent a showing of manifest error or a showing of new facts or legal authority that could not have been brought to [the Court's] attention earlier with reasonable diligence.'" *Salt River Project Agric. Improvement & Power Dist. v. Trench France SAS*, No. CV-17-01468-PHX-DGC, 2017 WL 6554860, at \*1 (D. Ariz. Dec. 22, 2017) (*quoting* LRCiv 7.2(g)(1); *citing* *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003)). As a result, there are only "four circumstances where a motion for reconsideration will be granted: (1) the moving party has discovered material differences in fact or law from those presented to the Court at the time of its initial decision, and the party could not previously have known of the factual or legal differences through the exercise of reasonable diligence; (2) material factual events have occurred since the Court's initial decision; (3) there has been a material change in the law since the Court's initial decision; or (4) the moving party makes a convincing showing that the Court failed to consider material facts that were presented to the Court at the time of its initial decision." *Nicole-Pickett v. Wells Fargo Bank, N.A.*, No. CV-16-03262-PHX-DGC, 2016 WL 7187988, at \*1 (D. Ariz. Dec. 12, 2016). None of these circumstances occurred here, and Plaintiff provide no reason that these complaint

This is an Eclipse Filter case. The jury will be asked to decide whether *the Eclipse* is defective and unreasonably dangerous, and whether Bard provided appropriate and adequate warnings *concerning the Eclipse*. But, Plaintiff would rather try this case as a referendum on the Recovery Filter. Indeed, Plaintiff's Motion for Reconsideration once again makes clear her desire to inflame the jury by attempting to inject into this case irrelevant evidence regarding Recovery cephalad migration-related deaths. This Court correctly found such evidence to have, at most, "marginal relevancy" in this Eclipse case. (Dkt. No. 10819, at 5.) Bard respectfully requests that this Court reconfirm its conclusion that evidence of Recovery cephalad migration deaths should be excluded from this Eclipse case pursuant to Rule 403 because the probative value, if any, of such evidence is substantially outweighed by the prejudicial effect.

### **ARGUMENT AND CITATION TO AUTHORITIES**

#### **A. Plaintiff Still Cannot Identify Any Reports of Death Caused by the Cephalad Migration of a G2, G2X, or Eclipse Filter.**

Plaintiff requested leave to file her Motion for Reconsideration ostensibly because she claims to have identified deaths allegedly caused by the cephalad migration of a Bard G2, G2X, or Eclipse Filter. Bard's position has consistently been that Bard's later generation IVC filters largely resolved the problem of cephalad migration, and that, notwithstanding having sold more than 180,000 G2/G2X Filters and more than 66,000 Eclipse Filters, and producing the relevant internal complaint files regarding those devices to Plaintiff, Bard was unaware of any report of a G2, G2X, or Eclipse Filter migrating to a patient's heart and allegedly causing the patient's death. Bard's position is confirmed by Plaintiff's Motion for Reconsideration, including by the information

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files, produced to Plaintiff two years ago, "could not have been brought to the Court's attention earlier with reasonable diligence." "No motion for reconsideration of an Order may repeat any oral or written argument made by the movant . . . that resulted in the Order," and it is not "the time to ask the Court to rethink what it has already thought." L.R. Civ. 7.2(g)(1); *Nicole-Pickett*, 2016 WL 7187988 at \*1. As a result, Plaintiff's motion should be denied.

2 [REDACTED]

1 [REDACTED]  
2 Thus, according to the complaint file, the patient did not die “from filter migration  
3 to heart,” as Plaintiff claims. [REDACTED]

4 [REDACTED]  
5 [REDACTED].<sup>3</sup>

6 **Complaint No. 354264:** Again, Plaintiff claims that this report discusses “death  
7 from filter migration to heart.” (Pl.’s Mot. at 4.) Again, Plaintiff’s characterization of this  
8 report is simply not accurate.

9 The Complaint Record Detail Report, attached as a portion of Exhibit B to  
10 Plaintiff’s Motion (*see* Pl.’s Mot., Ex. B, at 72-76 (Bates labeled BPV-COMP-00026440  
11 to 26444), demonstrates that Complaint No. 354264 *is not* a report of death caused by  
12 the cephalad migration of an Eclipse Filter, as Plaintiff claims. The complaint file notes

13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 Thus, as shown in the Complaint Record Detail Report attached to Plaintiff’s  
20

21 <sup>3</sup> Plaintiff tacitly recognizes that this complaint is dissimilar from the Recovery Filter  
22 cephalad migration deaths -- where the entire device *and* a large clot burden migrated to a  
23 patient’s heart, allegedly causing death (*see, e.g.*, Pl.’s Mot., Ex. N, at 6-7 (Bates labeled  
24 BPV-17-01-00153663 to 153664 (noting that in first report of Recovery cephalad  
25 migration-related death, the filter was encased in clot and was found to have migrated to  
26 the patient’s right atrium))) -- but she tries to find similarities with the Eclipse events by  
27 arguing that both “were associated with large clot burdens.” (*See* Pl.’s Mot. at 6 n.3.)  
28 That the Recovery and Eclipse death events both involved “large clot burdens” only tells a  
small portion of the story. Indeed, a case involving a migration of a large clot and a Bard  
filter to the heart is very different from a case involving a Bard filter that stopped a clot  
from reaching a patient’s heart, the Bard filter and clot being removed, and then a  
competitor filter implanted, with the patient later passing away due to another pulmonary  
embolism. Plaintiff’s attempt to claim that these two types of events are identical or  
substantially similar strains credulity.

1 Motion, it was never determined that this patient died “from filter migration to heart,” as  
 2 Plaintiff claims. [REDACTED]

3 [REDACTED]  
 4 [REDACTED]  
 5 **Remaining Complaints Identified in Plaintiff’s Exhibit B:** Plaintiff also  
 6 identifies additional purported non-fatal cephalad migration events associated with the  
 7 G2, G2X, and Eclipse Filters. But Bard has never argued that its later generation IVC  
 8 filters are 100% free from the risk of cephalad migration. To the contrary, Bard has  
 9 consistently argued that the risk of cephalad migration is a risk associated with all makes  
 10 and models of IVC filters, and that reports of cephalad migration of filters to the heart  
 11 have been associated with many different filters, including the SNF and competitor  
 12 filters. That is why cephalad migration is described in the SIR Guidelines, and why Bard  
 13 warns of such migration in each and every one of its retrievable filter IFUs.

14 Bard’s position is that its subsequent generation IVC filters largely addressed and  
 15 resolved the complication of cephalad migration as compared to the Recovery. Notably,  
 16 Plaintiff presents no evidence or data suggesting that cephalad migration occurred with  
 17 Bard’s subsequent generation filters anywhere near the same frequency as with the  
 18 Recovery. Instead, Plaintiff’s counsel admitted during argument that “there is not a lot of  
 19 cephalad migration” with Bard’s later generation filters, and that Bard’s later generation  
 20 filters “by and large” “fix[ed]” cephalad migration. (4/13/18 Pretrial Conference Trans.  
 21 at 14:9-10; 15:19-21.)

22 Finally, most of the non-death cephalad migrations identified in Plaintiff’s Exhibit  
 23 B do not involve migrations to the heart (e.g., Complaint File Nos. 291446, 239963,  
 24 248122, and 260851), or they involve circumstances where the filter legs did not fully  
 25 open and deploy at implant, events which are unlike the Recovery Filter cephalad  
 26 migration-related deaths (e.g., Complaint File Nos. 250927<sup>4</sup>, 273135<sup>5</sup>, and 283282). In

27 \_\_\_\_\_  
 28 <sup>4</sup> Plaintiff’s narrative in her “Representative Summary” fails to note [REDACTED]

fact, the only non-Recovery Filter cephalad migration event identified in Plaintiff's Exhibit B, Complaint File No. 383261, [REDACTED] [REDACTED] (Pl.'s' Mot., Ex. B, at 123 (Bates labeled BPV-COMP-00027608).)

\* \* \*

As demonstrated above, and contrary to Plaintiff's argument, Bard's representations to this Court that it is unaware of any report of a G2, G2X, or Eclipse Filter migrating to a patient's heart and allegedly causing the patient's death remains 100% accurate. Plaintiff has gone to great lengths to try to argue that two reports out of the numerous patients who received G2/G2X/Eclipse Filters (out of more than 246,000 sold) who subsequently passed away are examples of "death from filter migration to heart," (*see* Pl.'s Mot. at 4), but those efforts have proven fruitless. The two Eclipse death events are simply not examples of patient death due to an alleged cephalad migration of the filters to the patients' hearts.

Because the fundamental premise of Plaintiff's Motion is proven to be false, and there are still no confirmed reports of cephalad migration to the heart allegedly causing death associated with Bard's later generation filters, the logic that underlies this Court's original ruling remains fully sound, and Plaintiff's Motion for Reconsideration should be denied.

**B. Any Marginal Probative Value of Evidence Concerning Recovery Filter Cephalad Migration-Related Deaths Is Substantially Outweighed by the Risk of Unfair Prejudice.**

This Court previously found that the "marginal relevanc[e]" of evidence

[REDACTED]" (Pl.'s' Mot., Ex. B, at 154 (Bates labeled TW\_COMPLAINT\_004754).)

<sup>5</sup> Plaintiff's narrative in her "Representative Summary" fails to note that [REDACTED]

(*See* Pl.'s' Mot., Ex. B, at 187 (Bates labeled TW\_COMPLAINT\_005181).)



1 concerning Recovery Filter cephalad migration death is “substantially outweighed by the  
2 danger of unfair prejudice.” (Dkt. No. 10819, at 5.) That marginal relevance remains  
3 unchanged despite Plaintiff’s Motion for Reconsideration, given the Court’s fundamental  
4 premise -- i.e., that there are no confirmed reports of a G2, G2X, or Eclipse Filter  
5 migrating to a patient’s heart and allegedly causing the patient’s death -- remains  
6 accurate.

7 Moreover, Plaintiff’s Motion confirms the unfairly prejudicial impact that  
8 evidence of Recovery cephalad migration death would have on this Eclipse case. For  
9 example, Plaintiff argues that testimony from Dr. Gary Cohen (a physician who *did not*  
10 treat Ms. Jones) is “powerful evidence that Bard knew about risks with its product [i.e.,  
11 the Recovery] but failed to tell physicians about it, including the fact that the Recovery  
12 had been placed on a QC hold.” (Pl.’s Mot. at 9 n. 6.) Using such testimony to argue that  
13 Bard failed to warn about the Recovery Filter, in a case involving the Eclipse Filter,  
14 would unfairly prejudice Bard and would confuse the issues. It would inappropriately  
15 invite the jury to find that Bard has a propensity to fail to warn doctors about all of its  
16 products, including the Eclipse, which is a violation of Federal Rule of Evidence, Rule  
17 404(a)&(b). Plaintiff’s use of such testimony would also run afoul of this Court’s prior  
18 conclusion that “Bard’s general failure to disclose problems with the Recovery is not  
19 relevant to design of the G2 and is only marginally relevant, if relevant at all, to Bard’s  
20 alleged failure to warn claim with respect to the G2. The danger of unfair prejudice from  
21 these questions substantially outweighs any probative value.” (Dkt. No. 10438.)

22 Similarly, Plaintiff seeks to inappropriately use evidence of Recovery Filter  
23 cephalad migration death root cause analyses to try to prove that Bard conducted  
24 inadequate root cause analyses with its Eclipse Filter. (*See, e.g.*, Pl.’s’ Mot. at 4.)  
25 Plaintiff also seeks to use evidence of Recovery cephalad migration deaths to prove that  
26 Bard, “in the face of continued cephalad migrations,” inappropriately “reevaluat[ed] its  
27  
28



1 design once again within months of the Eclipse launch.”<sup>6</sup> Again, using such evidence to  
2 try to prove propensity is prohibited by Rule 404(a)&(b).

3 At bottom, this Court previously recognized the inherent risk of unfair prejudice  
4 that would be presented if evidence of Recovery Filter cephalad migration-related deaths  
5 is injected into this Eclipse case. (*See, e.g.*, Dkt. No. 10438, at 5-6.) Plaintiff’s Motion  
6 only confirms that risk. Because Plaintiff has not presented any new evidence  
7 demonstrating the relevance of evidence of cephalad migration death, this Court should  
8 confirm its finding that any probative value of such evidence is substantially outweighed  
9 by the risk of unfair prejudice.

### 10 **C. Evidence of Recovery Cephalad Migration-Related Deaths Can Be Removed** 11 **From This Case.**

12 Plaintiff’s concern that evidence of Recovery Filter cephalad migration-related  
13 deaths cannot “reasonably be extracted” from the “overall complication evidence” is  
14 overblown. The parties can review their proposed deposition designations and documents  
15 that concern Recovery issues, and edit or redact the materials as necessary to remove  
16 references to Recovery cephalad migration-related deaths. Thus, Plaintiff’s concern can  
17 be addressed by careful review and editing.<sup>7</sup>

18 Additionally, Plaintiff has substantial non-Recovery and non-death migration  
19 evidence at her disposal. Indeed, Bard has produced to Plaintiff millions of pages of

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21 <sup>6</sup> The factual premise of Plaintiff’s argument -- that Bard sought to “redesign” the Eclipse  
22 within months of its release -- is simply not accurate. As Bard’s internal documents and  
23 communications to FDA make clear, Bard simultaneously developed the Eclipse,  
24 Meridian, and Denali Filters at the time.

25 <sup>7</sup> Regarding Plaintiff’s Exhibit O, Plaintiff has not met and conferred regarding  
26 application of the Court’s April 18, 2018, Order excluding Recovery Filter migration-  
27 related deaths to deposition designations. In an effort to meet the then April 20, 2018,  
28 deadline to submit all deposition designations and objections, counsel for Bard attempted  
to identify deposition testimony and exhibits impacted by the Court’s ruling on an  
expedited basis. Defense counsel’s attempt to quickly identify testimony impacted by the  
Court’s ruling included providing Plaintiff with Defendant’s objection language to insert  
into the transcript wherever Plaintiff did not agree to strike certain testimony. Defense  
counsel received no counter-proposals and heard nothing further from Plaintiff’s counsel  
until various excerpts appeared in Plaintiff’s Exhibit O. Defendants stand ready to meet  
and confer regarding the implementation of the Court’s ruling to deposition designations.

documents in this MDL, including the complete Eclipse design files, regulatory correspondence files, marketing, and post-market surveillance materials. Additionally, Plaintiff's allegations regarding the absence of Recovery complication or migration-related evidence outside the context of Recovery cephalad migration deaths are simply inaccurate. Contrary to Plaintiff's claim that there are "no documents reviewing or analyzing Recovery migrations independent of the deaths," (Pl.'s Mot. at 7), Bard has produced voluminous such documents, including evidence regarding the Asch clinical study and investigation into the reported cephalad migration from that trial (an issue that had some prominence in the Booker trial), post-market Recovery migration resistance assessments and testing, and the individual non-death Recovery cephalad migration complaint files produced by Bard in this case (and which include their own root cause analyses). Similarly, Bard has produced comprehensive investigations, failure investigation reports, and health hazard evaluations concerning Recovery Filter fracture (fracture being the complication that Ms. Jones actually experienced), and G2 Filter caudal migration. Accordingly, Plaintiff has substantial non-cephalad migration-related death evidence to fairly try her case.<sup>8</sup> And, as this Court concluded, Plaintiff may rely on her experts to attempt to prove her case without resorting to the unfairly prejudicial evidence of Recovery cephalad migration-related deaths. (*See, e.g.*, Dkt. No. 10438, at 4.)

### CONCLUSION

For the stated above, Bard respectfully requests that this Court deny Plaintiff's Motion for Reconsideration.

s/Richard B. North, Jr.  
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<sup>8</sup> Indeed, Plaintiff attached to her Motion for Reconsideration various documents concerning non-Recovery cephalad migration-related death issues that she feels support her claims. (*See, e.g.*, Pl.'s Mot., Exs. D, E, and H.)

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**Attorneys for Defendants C. R. Bard, Inc. and  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of April, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record.

s/Richard B. North, Jr.  
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